

**American Bar Association
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**The United Nations Convention against
Corruption (UNCAC) and Georgian Legislation**

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Promoting the Rule of Law

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The following report was prepared by the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI) in cooperation with a group of experts from the Parliament of Georgia and the Supreme Court. The working group consisted of the following individuals:

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The report was based on the study conducted during November 2005 – May 2006. ABA/CEELI Senior Legal Advisor [Nino Khurtsidze](#) participated in all working group meetings and worked on the report together with the experts. ABA/CEELI Legal Education Intern Ketevan Iremasvhili assisted with preparing the report for publication. The experts worked from the authentic Georgian translation of the UN Convention against Corruption provided to ABA/CEELI by the Ministry of Foreign Affairs of Georgia.

The United Nations Convention against Corruption (UNCAC) and Georgian Legislation

Executive Summary

The United Nations Convention against Corruption and Georgian Legislation provides a comparative analysis of Georgian legislation and the UNCAC provisions. The study was conducted during November 2005 – May 2006 and the report was prepared by the American Bar Association’s Central European and Eurasian Law Initiative (ABA/CEELI) in cooperation with a group of experts from the Parliament of Georgia and the Supreme Court. The United States Agency for International Development (USAID) supported the project throughout its implementation.

The purpose of the report, which provides a comparative article-by-article analysis of the Convention and Georgian legislation, is to identify where Georgian legislation complies with the UNCAC standards and where there are gaps and inconsistencies that must be addressed before the Convention’s ratification. The experts studied all Georgian legislation directly or marginally dealing with anti-corruption issues, as well as international best practices for combating corruption. The analysis includes information and recommendations about those changes and amendments to the national legislation that would be useful in the process of ratification and implementation of the Treaty.

About the Convention

The UN Convention against Corruption is a revolutionary step in international criminal law, as it is the first international instrument that attempts to regulate corruption in one complex legal act. The UNCAC is also a manifestation of international consensus on what the states should do to prevent and criminalize corruption, and to improve international cooperation in combating corruption and recovering assets. The Convention highlights the importance of distributing responsibility among states for the occurrence of trans-boarder corruption crimes.

The UNCAC’s major achievements are the diversity of preventive measures, criminalization of corruption in both public and private sectors, broadening of the concept of liability of legal persons, extension of the statute of limitations on corruption crimes, enhancement of the role of civil society and access to information, reinforcement of anti-money laundering measures, and encouragement of mutual legal assistance among states. The biggest UNCAC innovation has to do with asset recovery, which consists of measures for direct recovery of property, international cooperation for purposes of confiscation, and return and disposal of assets.

As of May 9, 2006, 83 UN member states have ratified the Convention and another 140 have signed the document. Georgia has not yet signed the Convention, but first steps have been undertaken to that effect. With the March 28, 2006 Presidential Decree (#155), approving the Action Plan implementing the National Anti-Corruption Strategy, the Ministries of Justice and Foreign Affairs were charged with undertaking all necessary steps to prepare the grounds for the signing and ratification of the UNCAC.

While the full report contains detailed comparative legal analysis of congruity of Georgian legislation with the UNCAC provisions, this executive summary will draw attention to those issues that are particularly interesting in terms of harmonization of Georgian laws with the UN Convention against Corruption. The summary will highlight the following topics:

- Corruption in public and private sectors
- Independent anti-corruption agency
- Expanding the notion of liability of legal persons
- Combating money laundering, asset recovery, return and disposal of assets, and
- Cooperation on international and national levels.

Corruption in Public and Private Sectors: Preventive Measures

The discussion of public sector corruption must start with defining who constitutes the “subject of the crime.” The UNCAC definition of a public official is much broader than that provided in Georgian laws. Unlike the UNCAC, Georgian legislation does not consider persons appointed to public office on a contractual basis (as opposed to those appointed for an indefinite period as a fulltime staff in a budgetary institution) as subjects of crime.¹ Another difference is that the Georgian Criminal Code does not provide for responsibility of foreign public officials or officials of public international organizations for corruption related crimes.

Code of Conduct for Public Officials

To promote correct and ethical performance of public functions, the UNCAC recommends that the member states adopt codes of conduct for public officials. The GOG should consider the adoption of Code of Conduct for Public Officials, which will unify and codify various ethical norms, including those pertaining to conflict of interests. Once the Code of Conduct for Public Officials is adopted, each public sector institution could be granted the right to develop internal norms of conduct, which will reflect specific organizational matters and incorporate them into the general norms. Each institution could create an internal Ethics Commission, which will be charged with oversight functions and which will deal with conflict of interests issues. The code should not be simply aspirational, but also enforceable. To achieve this goal, each specific prohibition must have a specific sanction.

It is worth noting that Georgian legislation lacks provisions defining post-employment restrictions for public officials. The law does not provide a mechanism for reporting and monitoring post-employment activities. The adoption of a code of conduct for public officials could go a long way toward resolving this issue.

Illicit Enrichment

Article 20 of the Convention urges the state parties to consider the adoption of such legislative and other measures that would establish illicit enrichment – defined as a

¹ See Article 2 of the Law of Georgia on Conflict of Interests and Corruption in the Public Sector.

significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income – as a criminal offence. A comparable provision on illicit enrichment cannot be found in Georgian criminal legislation. However, Chapter VII² of the Georgian Administrative Procedure Code provides detailed procedures for confiscating those assets of a public official that he or she acquired illegally or cannot reasonably explain in relation to his or her lawful income. Direct insertion of Article 20 of the UNCAC in the Georgian Criminal Code could create a substantial collision, as the Code has separate provisions regulating economic crime. Consequently, those wishing to amend the Criminal Code must initially study the issue of effectiveness of current legislation on economic crime and then decide whether the insertion of the UNCAC-type illicit enrichment provisions in the Criminal Code is a wise option.

Gift Restriction

The assessment of available effective methods of combating corruption shows that there are some obvious gaps in Georgian legislation regarding gift restriction. To begin with, the legislator does not provide an exhaustive list of what could constitute a “gift.” Thus, according to the Law on Conflict of Interest and Corruption, grants from international organizations, stipends, awards, or honoraria are not considered as gifts that must be regulated by the law.

Another problem is that while Georgian law gives all public officials and their close relatives 72 hours for returning received gift to either the gift-giver or the State Treasury,² it has not established a similar mechanism for gifts received abroad. Neither does it designate an organ or an agency that would be charged with evaluating the value of a gift or accepting illegal gifts, in order to dispose of them at public auction and transfer the received funds to the state budget. If such provision is not incorporated in the legislation, it would be impossible to regulate relations that arise from giving and receiving gifts. The legislator must clearly delineate sanctions for each instance of illegal gift-giving. It must also provide detailed norms for monitoring and administering a gift restriction system, which would (1) clearly define procedures for accepting, evaluating, and returning gifts, and (2) designate a special body that would both evaluate and dispose these gifts.

The issue of gift acceptance is not fully ignored by the Georgian legislator. The Georgian legislation prohibits a public official, as well as his or her close relative from accepting gifts, if they have been offered due to his or her public position. The law also prohibits public official and their close relatives from accepting gifts from those persons who have had or will have official relations with the public official. Although there is a clear prohibition, the law does not provide a sanction, which leads to the creation of the so called “dead norms.” This is why it is particularly important that apart from adopting a clear regulatory framework on giving and accepting gifts, the Georgian legislature to consider establishing appropriate sanctions toward family members of public officials for accepting illegal gifts.

² See the Law of Georgia on Conflict of Interests and Corruption in the Public Sector, Article 12, para. 2.

Systems for the Recruitment, Retention, Promotion, and Retirement of Civil Servants

Improving public service and creating an efficient civil service system is one of the cornerstones of preventing and eradicating corruption. Georgian legislation has yet to delineate those formal conditions that are necessary before an individual assumes public office or to recognize staff rotation principle in public service (except for diplomatic service). Neither are there job descriptions for public officials or rules for career advancement in public service. Georgian legislation must require that recruitment and hiring of public officials should only take place through competitions. The law should also establish minimum and additional qualification criteria for specific public service positions and detailed conditions and procedures for conducting competitions. It would be desirable to develop job descriptions for public officials, which would be more or less comparable for all public institutions.

Public Procurement and Management of Public Finances

The UNCAC mandates that each member state “establish appropriate systems of procurement, based on transparency, competition and objective criteria in decisionmaking, that are effective ... in preventing corruption.”³ Although Georgia has made progress with respect to public procurement and management of public finances, much more needs to be done to fulfill the UNCAC provisions.

According to Georgian legislation, the Procurement Office is a legal entity of public law directly under the Ministry of Economic Development. As the MOED is one of the biggest buyers in the country, it would be more appropriate to transform the procurement office into an independent regulatory agency, which would be directly accountable to either the President or the Parliament of Georgia. The Government of Georgia should also consider the implementation of an electronic procurement system. Such a system would not only promote transparency in public procurement, but also make it possible to analyze the procurement practice of various government institutions, encouraging efficient spending of public funds.

Proper accounting and auditing principles are very important in improving the management of public finances. Georgian legislation has yet to establish unified principles of conducting internal and external audits in public institutions. The rules for public sector audit should be drawn from the standards developed by the International Organization of Supreme Audit Institutions (INTOSAI). In addition, each public institution must have clear accounting standards and procedures, including rules for formulating budget and spending budgetary funds. International Federation of Accountants has already developed international standards and “guidelines on practical experience” for public sector accounting, which could serve as a basis for developing proper accounting procedures.

Public Participation

The Convention encourages all member states to promote participation of individuals and groups outside the public sector, such as the civil society, non-

³ Article 9.

governmental organizations, and community-based organizations, in the prevention of and the fight against corruption. It is particularly important to ensure that the society is able to receive comprehensive and immediate information about the activities of each concrete national or local government agency or organ of self-government.⁴

One of the ways to ensure the implementation of the UNCAC provisions would be to promote independent investigative journalism and adopt protective measures to assure the safety of investigative journalists. It is also very important that governmental structures improve mechanisms for promoting closer cooperation with the mass media and providing journalists with objective information. For example, publicly financed Georgian Public Broadcasting (GPB) has a special role in combating and preventing corruption; therefore, the GPB's independence and impartiality should be particularly nurtured.

Furthermore, Georgia should ensure proper identification of those organs that are charged with providing the public with information, such as information bureaus. These information bureaus should provide the public with timely, comprehensive, and straightforward information about the state's decisions of public nature. Special attention should be given to providing information to small- and medium-sized enterprises located in the regions.

To ensure public participation in the government accountability system, all state agencies should form civic monitoring bodies. Their functions, composition, jurisdiction, and activities should be determined by law. Furthermore, each budgetary organization must publish an annual activity report, including a financial report.

Sanctions

The UN Convention against Corruption provides that each state party "shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence."⁵ The requirement of Article 30 is only partially reflected in Georgian legislation, inasmuch as the Criminal Procedure Code only provides for "removal" of a public official, rather than adopting broader sanctions, such as suspension or reassignment, as suggested by the Convention.

The UN Convention against Corruption and Georgian legislation have a somewhat divergent take on differentiating between public and private sector corruption crimes. For example, the Georgian Criminal Code has separate provisions criminalizing taking a bribe, offering or giving a bribe, and commercial enticement, while the Convention views these acts as different parts of one crime. Merging the above-mentioned Criminal Code provisions and placing equal criminal sanctions on

⁴ See Article 13 of the UNCAC.

⁵ See Article 30, para. 6 of the UNCAC.

public officials and persons engaged in commercial activities do not seem appropriate. It also seems advisable for Georgian legislator to distinguish clearly between the different crimes provided for in Article 21 of the Convention and add appropriate provisions to the Georgian Criminal Code.

When discussing anti-corruption measures in the private sector, one must keep in mind that apart from numerous written laws that attempt to promote better corporate governance and regulate corporate behavior, there are many “unwritten laws” that are followed in the corporate world. A corporate code of conduct is one example of such an unwritten rule. It would be advisable if public and private sector representatives created a set of national corporate governance principles, which would promote democratic, impartial, and transparent management practice, regulate important corporate activities, and establish basis for effective management of joint stock companies.

Institutional Anti-Corruption Measures

Independent Anti-Corruption Agency

The establishment of an independent anti-corruption agency (or agencies) is one of the many issues raised by the UN Convention against Corruption. Such an agency would be charged with implementing various measures preventing instances of corruption, including developing an anti-corruption policy, overseeing AC policy implementation, promoting knowledge creation related to corruption prevention measures, and engaging in public outreach to disseminate this knowledge. Article 6 of the Convention explicitly recommends that a special anti-corruption organ is granted the necessary independence for carrying out its activities.

As of today, Georgia does not have an independent anti-corruption organ. Over the years, various institutions were charged with implementing corruption prevention measures. On April 13, 2001, the President of Georgia issued a decree establishing the Anti-Corruption Coordination Council. The Council was designed as an advisory organ, which was charged with developing the national anti-corruption strategy and action plan and coordination of activities related to their implementation. The Council was abolished by the Presidential Decree # 139, issued on April 22, 2004.

Afterwards, the National Security Council (NSC) of Georgia served as the country’s Anti-Corruption body. Thus, based on Article 2 of the Law on the National Security Council of Georgia, the President charged the NSC with organizing the process of drafting the National Anti-Corruption Strategy. Although the NSC did deliver the Strategy, the Action Plan⁶ for its implementation was developed and its implementation is being monitored by the State Ministry of Reform Coordination. Neither the NSC, nor the State Ministry of Reform Coordination, are independent anti-corruption agencies promoted by the UNCAC.

⁶ The Action Plan was approved by the Government of Georgia on September 12, 2005.

Therefore, it is important that Georgia establish an independent anti-corruption agency, which will be accountable to the Parliament. This could be done by creating a legal person of public law and granting it the independence necessary for carrying out its functions successfully. This agency should have investigative, prosecutorial, and law enforcement powers and the person heading the agency should be granted the same powers as a prosecutor. Apart from preventing and combating corruption crime committed by high public officials, the agency should promote meaningful cooperation between various bodies charged with combating corruption.

Specialized Anti-Corruption Unit

Article 36 of the Convention encourages the state parties to “ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.” This statement is, in effect, congruous with Georgian legislation. Though, there are instances of duplicating functions among the various agencies. For example, the detection and prevention of corruption crimes is one of the many functions of the Constitutional Security Department at the Ministry of Internal Affairs. The power of pretrial investigation on malfeasance crimes is granted solely to the General Procuracy.⁷ In addition, the General Prosecutor’s Office has a special Anti-Money Laundering Unit, which deals with instances of bribery or acceptance of illegal gifts, as well as conducts full pretrial investigation on these and other cases covered by Chapter XXXIX of the Criminal Code. To complete the list, the National Anti-Corruption Strategy envisages the formation of special units within the General Prosecutor’s Office and the Ministry of Internal Affairs, focusing on corruption crimes committed by high officials.

Based on the above-mentioned, it would be advisable to form a special anti-corruption structural unit within the executive branch, which will be independent from all other government institutions. This independence could be ensured by making the head of the unit accountable to the President of Georgia. Only this structural unit should be given the powers to implement corruption prevention measures, including the detection of corruption crimes, undertaking pretrial investigations, and representing the state in the court of law.

The Liability of Legal Persons

The UN Convention against Corruption requires all state parties to establish criminal, civil, and administrative liability of legal persons for participating in offences established in accordance with this Convention.⁸ The current approach to this concept among members of the international community is different. Since criminal law in the continental system is based on the principle of individual guilt, the idea of incorporating the concept of criminal liability of legal persons in these

⁷ See the Georgian Criminal Procedure Code, Chapter XXXIX.

⁸ The recent corporate scandals around the world have demonstrated that in many instances administrative and civil liability measures often are not enough to render the desired effect. For this reason, many European states, including those in Eastern Europe, have adopted criminal liability of legal persons for committing certain crimes.

legislative frameworks has created lots of controversy. Despite this, the civil law jurisdictions do accept the principle of vicarious liability, which could be one of the ways of resolving this controversy.⁹

While working on this report, Georgian Criminal Code did not include separate clauses regulating criminal liability of legal persons. The only provisions, where legal persons are considered to be subjects of crime are contained in Article 17¹ on Racket and Racketeering Groups. However, since then, the Georgian Criminal Code has been amended to incorporate criminal liability of legal persons. Chapter XVIII¹ of Criminal Code Section XVI¹ regulates the issues related to criminal liability of legal persons, including types of sanctions for crimes covered in that chapter and conditions for their application. Changes in Article 7 and 40 of the Criminal Code, as well as other Criminal Procedure Code provisions that are related to legal persons were also adopted.

However, the above-mentioned changes are not enough to achieve full harmonization of Georgian legislation with the UN Convention against Corruption. Specifically, the Code must expand the list of crimes to include criminal liability of legal persons for bribing or enticing public officials from other states or international organizations. Based on international practice, it is advisable to consider limiting the right to conduct activities as one of the sanctions applied to legal persons. It is also advisable to consider the inclusion of the OECD Anti-Bribery Convention¹⁰ principles related to the liability of legal persons into Georgian legislation.

Combating Money Laundering, Asset Recovery, Return and Disposal of Assets

With the adoption of the Law on Preventing the Legalization of Illicit Income (AML Law) in 2003 and ensuing changes and amendments in the country's banking legislation, the requirements presented by the UN Convention against Corruption are almost fully met. However, several draft laws introduced to the Parliament of Georgia in April 2006 by the Georgian Government do create grounds for concern. For example, the proposed changes to Article 6 of the AML Law is against the UNCAC anti-money laundering provisions, as well as the EU Directive 91/308/EEC (Article 3/1) according to which a financial institution is obligated to identify its client prior to establishing business relations with him or her. The draft law provides that this obligation applies only to transactions that have a value of 6,000GEL or more.

The proposed amendments, if adopted, would also abolish and weaken the requirements that are now in place for those persons who hold a substantial share of

⁹ See Corruption and Corporate Criminal Liability: www.icclr.law.ubc.ca/Publications/Reports/FergusonDF; Criminal liability of legal persons in legislation of European countries: www.juridica.ee/juridica_en.php?document=en/articles/1999/8/15760.SUM.php; Identification theory, Vicarious liability, and the Corporate Culture: www.filion.on.ca/pdf/CML%202003%20Paper.pdf.

¹⁰ Officially, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

stocks in commercial banks. These requirements were put in place to ensure the functioning of an adequate oversight system, which is determined by the EU Banking Directive 2000/12/EC and which is fully congruous with international best practices. Consequently, it would be unwise to abolish this clause.

The proposed amendments would relax the provisions related to offshore transactions as well. If adopted, they would abolish a requirement to monitor electronic transfer of funds to Georgian bank accounts from banks registered in offshore zones or vice versa. The monitoring requirement would no longer apply to loans granted or received by a person (physical or legal) registered in an offshore zone or to any other transactions conducted by such a person. The proposed amendments to the AML Law also exempts grant making or charity giving persons or organizations from the monitoring requirement. Simply put, these changes are unwise, as the latest practice of preventing legalization of illicit income shows, there could be a direct link between charity organizations or legal persons registered in offshore zones with money laundering and terrorism financing.

In a nutshell, the above-discussed amendments go too far in simplifying the identification process, and thus go against both the FATF Recommendations and the EU Directives on anti-money laundering.

Georgian anti-money laundering legislation does not include provisions that would allow law enforcement agencies to differentiate sanctions applied to individuals participating in the commission of a money laundering crime. There is no possibility of imposing a lesser or higher sanction depending upon the degree of a person's involvement in the commission of such a crime. Apart from applying criminal sanctions to those convicted of laundering money, the law should consider applying various fiscal and civil law sanctions.

One of the requirements of the UN Convention against Corruption is that public officials who have any interest in or any jurisdiction over a financial account located in a different country must notify relevant organs about it and provide regular reports about transactions made on this account. Georgia has yet to incorporate this requirement into its legislation.

It would be advisable, if Georgian legislation substitutes the term "legalization of illicit income" with the term "money laundering," as the latter has long stopped being a slang word and since the 1988 Vienna Conventions has been used as an official term not only in international standards of peremptory nature, but also in legislation of most states (e.g. the United Kingdom - Anti-Money Laundering Act; Switzerland - Act on Laundering Money in Casinos (1998) and Act on Laundering Money in a Financial Sector (1998); Turkey - Law #4208 on Preventing Money Laundering).

While working on the report, the experts identified another interesting problem of terminology that is worth noting. Article 2, para. E of the Convention defines proceeds of crime, as "any property derived from or obtained, directly or indirectly, through the commission of an offence." However, the Russian text of the Convention, which is one of the original languages of the Convention, translates the

term “commission of an offence” as “commission of any offence.” In many states, including Georgia, the legislator clearly delineates the list of those predicate offences that could lead to accumulation of illicit income. For example, the Law of Georgia on Preventing the Legalization of Illicit Income defines illicit income, “as monetary assets or other property or rights to a property that a person gained through committing crimes provided for by the Criminal Code of Georgia (including arms trade, drug-related crime, trafficking, and terrorism), except for crimes committed in taxation and customs spheres.”¹¹ The mistake made in the Russian text of the UNCAC could lead the GOG toward making an erroneous reservation that crimes committed in taxation and customs spheres would not be covered by the Convention.

Financial Monitoring Service

One of the ways to combat money laundering is to monitor bank transactions. In this, Georgia is fulfilling the requirements set forth by the convention. Georgia’s Financial Monitoring Service (FMS) was established in 2003 based on the Law on Preventing the Legalization of Illicit Income. It is a legal person of public law, created under the National Bank of Georgia. The FMS is charged with (1) developing an information network, (2) systematizing and analyzing the collected information, (3) ensuring the development and functioning of relevant databases, (4) forwarding all available information and materials about suspicious transactions to law enforcement agencies, and (5) petitioning the court to seize the property that could be a result of or the means for legalizing illicit income, or is used in some way as an instrument of legalizing illicit income. All transfer of information about a person’s bank accounts (including transactions and balance) to law enforcement agencies is based on the pertinent court order.

The Law provides a list of persons, who are charged with monitoring transactions and reporting information about suspicious transactions to relevant organs. The Law also determines those supervisory organs that must oversee that the persons charged with monitoring transactions are indeed following the law. There are five such organs: the National Bank of Georgia, the State Office of Insurance Oversight, the National Securities Commission, the Ministry of Finance, and the Ministry of Justice.

Asset Recovery and Confiscation

Many consider the Convention’s special section on asset recovery as a conceptual revolution in international criminal law. With this step, the UNCAC was able to encapsulate those asset recovery efforts of the OECD and other international organizations, which during the last 15 years could only be regulated within the framework of bilateral agreements. The UNCAC asset recovery section is a true challenge for member states, as it requires them to establish unified legal standards for transnational asset recovery, as well as to resolve all conflicts based on principles of sovereignty and international cooperation.

¹¹ See Article 2 of the Law.

The UNCAC asset recovery provisions are partly dealt with in various laws and regulations. In general, however, Georgian legislation is not familiar with the principles and premises of Chapter V of the Convention. For example, Georgian legislation does not have a single provision admitting another state's rights as the lawful owner of a property that is subject to confiscation, if this property is acquired as a result of committing an offence regulated by the Convention.

The requirements of the Convention regarding managing the confiscated property are not reflected in Georgian legislation. It is unclear as to what legal act serves as the basis for the subsequent management and disposal of confiscated property, including property obtained as a result of transnational asset recovery. Obviously, this legal gap should be corrected and the matter should be dealt with in a public and transparent manner. The issues of transnational asset recovery and transfer of confiscated property to a foreign state could be regulated in Chapter XXXIII of the Criminal Procedure Code of Georgia.

The Civil Procedure Code of Georgia regulates the process of confiscating property gained through racketeering and criminal activities of the so-called thieves-in-law. The actual definition of such a property is given in the Law of Georgia on Organized Crime and Racketeering.

As for the possibility of seizure, the Criminal Procedure Code used to have provisions on "procedural confiscation" and "confiscation of illegally acquired property." However, as the Council of Europe has pointed out several times, these notions were vague and only covered public officials. Furthermore, the norms about seizure and confiscation of illegally acquired property were against the provisions of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Consequently, relevant CPC provisions were harmonized with international standards. The issue of freezing or seizing a property based on the request of another member state of the Convention is regulated based on international and bilateral agreements concluded by Georgia.

Chapter XXXII of the Georgian Criminal Procedure Code includes provisions about cooperation of Georgian judicial, prosecutorial, and investigative authorities with competent authorities and public officials from other states for the purposes of providing certain kind of legal assistance. It would be wise, if Georgian legislators would consider the inclusion of a provision on disposal of confiscated property in the list of legal assistance subject to international cooperation.

The rules delineated in the Criminal Procedure Code apply on in those circumstances, when there is no bilateral mutual legal assistance agreement between Georgia and another state. Thus, the issue of providing legal assistance can be decided on the basis of an agreement that was concluded between the Georgian Minister of Justice or the General Prosecutor and their foreign counterparts specifically for this purpose.

Article 55 of the Convention is designed to deepen cooperation among its member states for purposes of confiscation, including the fait of confiscated property.

Georgian criminal legislation does not have a single provision regulating this matter. Therefore, it would be wise, if the issue of transferring confiscated property is decided based on interstate agreements, while the law would incorporate a peremptory norm requiring Georgia to return the confiscated property to another state based on the relevant interstate agreement (e.g. intergovernmental agreement). It might be a good idea to reinstate a pre-2003 version of Article 259 of the Criminal Procedure Code, according to which detention of a person subject to extradition, or search and seizure directed toward this person, or seizure of his or her property, was permitted only in cases when the extradition request included adequately approved order of a competent state organ (such as a decree or a decision) on undertaking such procedural measures that limit the person's constitutional rights and freedoms.

As of today, Georgia has not concluded any bilateral or multilateral agreements that regulate, even partially, issues related to asset recovery. Once asset recovery (including transnational asset recovery) is regulated on the domestic plane, it would be wise to encourage international cooperation by concluding relevant bilateral or multilateral interstate agreements.

International Cooperation and Cooperation with National Authorities

Cooperation, both with national authorities and within the international community, is the basic premise for an effective anti-corruption program. The UNCAC talks about both types of cooperation, while also attempting to establish a unified anti-corruption political and legal environment.

Cooperation with Law Enforcement Authorities

In terms of cooperation with national authorities, Article 37 of the Convention advises state parties to encourage persons who participate or who have participated in the commission of an offence to supply information useful to competent authorities by providing for the possibility of mitigating punishment of an accused person, or by granting immunity from prosecution. Article 37 also encourages the states to consider bilateral or multilateral cooperation while dealing with such matters.

Article 37 requirements are reflected in the Criminal Procedure Code of Georgia, which permits plea bargaining since February 13, 2004. As it currently stands, plea bargaining serves as the grounds for adopting a judicial decision without conducting substantive court hearing, while an agreement on guilt or punishment serves as the basis for plea bargaining.

Practical implementation of plea bargaining has been marred by numerous legal deficiencies, which have been vocally criticized by international organizations, including the European Parliament. The Council of Europe Monitoring Report states that

“co-rapporteurs [*sic*] consider that the specificities of Georgian version of the plea-bargaining system, especially the introduction of the financial

component and the seemingly arbitrary way in which it is applied to some cases and not to others, make this practice incompatible with Council of Europe standards. The system may not only create an impression that big thieves are allowed to buy an immunity from justice, but is also worrisome because the lack of legal and administrative checks and balances in the Georgian police, prosecutor services and courts create a risk for abuse. The co-rapporteurs [*sic*] understand that the money obtained through “plea bargaining” (some 30 million USD so far) is very important and has helped to pay for pensions and other immediate needs, but they disagree with the notion suggested by the Prosecutor General that the efficiency of justice can be measured against the budgetary income it helps to generate. After years of a widespread corruption and systematic disregard for the rule of law Georgia needs justice which is efficient and equal for all.”¹²

Critical statements like this are even more severe in reports issued by non-governmental organizations. Consequently, it is necessary adequately to regulate the financial component of plea bargaining system, so that the disposal of acquired income is public and transparent.

Cooperation between National Authorities and the Private Sector

Article 39 of the Convention encourages cooperation between national investigating and prosecuting authorities and entities of the private sector, such as financial institutions, relating to matters involving the commission of corruption (or corruption-related) offences. The article also talks about implementation of such measures that would encourage individuals to report to the national investigating and prosecuting authorities a commission of a corruption (or corruption-related) offence.

Provisions promoting such cooperation are amply found in Georgian legislation. For example, according to the Law on Activities of Commercial Banks, all information about bank accounts of legal and physical persons can be revealed, in cases determined by law, to the Financial Monitoring Service of Georgia. Other persons can also obtain this information based on relevant court decision.

The Law on Investigative Activities provides for a special form of cooperation between individuals and law enforcement authorities. According to the Law, a “secrete cooperator” (legally capable physical person of at least 18 years of age) cooperates with a law enforcement agency on contractual basis, performing duties delineated in the contract. If the cooperation with law enforcement authorities endangers the life, health or property of these persons, their family members or relatives, the law enforcement authorities are obliged to take all necessary measures to avoid the harmful results and to identify and apprehend persons suspected in wrongdoing. The law enforcement authorities are also required to implement special physical and social protection measures to protect the “secrete cooperator,” his or her family members and relatives.

¹² <http://assembly.coe.int/Documents/WorkingDocs/doc04/EDOC10383.htm#IIA>

International Cooperation

The Georgian Criminal Code has provisions on cooperating with other states based on international cooperation treaties concluded by Georgia. All crimes covered by the Criminal Code, including corruption crimes, are subject to these provisions. However, according to the Criminal Code, those persons who are accused of committing an act that is not punishable under Georgian law cannot be subject to extradition. Georgian law also prohibits extradition, if the committed crime (regardless of its category) is punishable by capital punishment in the country requesting the extradition. In both cases, the question of criminal responsibility will be determined according to the principles of international law.

According to the Constitution, the extradition of a Georgian citizen to another country is not permitted, unless otherwise provided in international treaties concluded by Georgia. The decision to extradite a citizen of Georgia can be appealed in the court of law. The same holds true about extradition decisions affecting citizens of other states or stateless persons.

Thus, the UNCAC provisions pertaining to extradition are generally congruous with Georgian legislation. However, considering the fact that the demands in Article 44, para. 6 of the Convention and the fact that para. 2, 3, and 5 seem to contradict both the Criminal Code, Criminal Procedure Code, and the Constitution of Georgia, it would be advisable if Georgia adhered to the Convention with making reservations to its Article 44, para. 2, 3, and 5.

If provided in international treaties concluded by Georgia, the Criminal Procedure Code grants Georgian courts of law, prosecutors, and investigators the right to

- (a) Request the extradition of a Georgian citizen for purposes of prosecuting and convicting him or her on the territory of the country or extradite foreign citizens to their country of citizenship for the same purpose, and
- (b) Request the extradition of a Georgian citizen, who was convicted in another country to serve his or sentence in Georgia or extradite foreign citizens to their country of citizenship for the same purpose.

The law provides that these requests be made either through the Ministry of Justice of Georgia or the General Prosecutor's Office.

Thus far, Georgian legislation does not include provisions on the following:

- Possibility of utilizing video connection when conducting investigative or judicial activities;
- Special clause on confidentiality of a request, as well as on provision and utilization of additional information;
- Special clause on transfer of criminal proceedings; and
- Special clause on forming joint investigative bodies for conducting joint investigations, in relation to matters that are subjects of investigations, prosecutions or judicial proceedings in one or more states;

At the same time, Georgian legislation does not include provisions regulating the unification of criminal proceedings, when they involve more than one jurisdiction.

Although, the Law of Georgia on Procuracy does provide for cooperation of the Prosecutor General's Office with relevant organs in other states.

Thus, Georgian criminal procedure legislation is generally congruous with the Convention's requirements on international cooperation among law enforcement agencies. However, it would be advisable to include more detailed norms that would further regulate this aspect of international cooperation. Georgian law enforcement agencies should be more proactive in cooperating with analogous institutions from other states to combat corruption crimes by concluding bilateral or multilateral agreements and memoranda of understanding.

Concluding Remarks

Georgia is a member of various international organizations, including the COE Group of States against Corruption (GRECO) and the OECD Anti-Corruption Network for Transition Economies. These organizations develop a set of recommendations for each of their member states, to improve mechanisms for combating and preventing corruption. These recommendations generally focus on the development of national anti-corruption strategy and its accurate implementation, adoption of proper legislative basis for combating corruption, criminalization of corruption, promotion of transparency in the public sector, promotion of international cooperation in anti-corruption matters, etc. It is very important to follow these recommendations as swiftly and diligently as possible and implement legal and institutional reforms for combating and preventing corruption.